05-9264

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2005

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ORIGINAL

ALPHONSO JAMES, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The Petitioner, Alphonso James, Jr., asks leave to file the enclosed Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit without prepayment of costs and to proceed *in forma pauperis* in accordance with Supreme Court Rule 39, and Title 18, U.S.C. § 3006A(d)(6). The filing of this petition is a continuation of the representation of the defendant under a Criminal Justice Act appointment of the Office of the Federal Public Defender for the Middle District of Florida, by the United States District Court for the Middle District of

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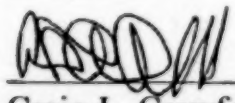
Florida. In accordance with § 3006A(d)(6), no affidavit as required by Supreme Court Rule 39, need be filed.

WHEREFORE, Petitioner, ALPHONSO JAMES, JR., prays for leave to proceed *in forma pauperis*.

RESPECTFULLY SUBMITTED this **14th day of February 2006**.

R. Fletcher Peacock
Federal Public Defender



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QUESTIONS PRESENTED

Issue I

Whether the Eleventh Circuit erred by holding that a state drug conviction, which did not necessarily involve manufacturing, distributing, or possessing with intent to manufacture or distribute, qualified as a serious drug offense under 18 U.S.C. § 924(e), in violation of *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005).

Issue II

Whether the Eleventh Circuit erred by holding that all convictions in Florida for attempted burglary qualify as a violent felony under 18 U.S.C. § 924(e), creating a circuit conflict on the issue.

Issue III

Whether the felon-in-possession statute, 18 U.S.C. § 922(g), is facially invalid because Congress failed to define commerce as interstate or foreign commerce. Additionally, whether the statute is unconstitutional because Congress acted beyond the power of the commerce clause by failing to require a substantial nexus.

LIST OF PARTIES

The parties to the judgment from which review is sought are Petitioner Alphonso James, Jr., and the United States of America, Respondent.

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OPINION BELOW

In a published opinion issued on November 17, 2005, the United States Court of Appeals for the Eleventh Circuit vacated and remanded the sentence imposed by the United States District Court for the Middle District of Florida. *See United States v. James*, 430 F.3d 1150 (11th Cir. 2005)(attached as Appendix A).

GROUNDS FOR JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over this criminal action pursuant to 18 U.S.C. § 3231. An appeal, by the government, and a cross appeal, by Mr. James, from that court's final judgment proceeded for review by the United States Court of Appeals for the Eleventh Circuit, in accordance with 18 U.S.C. § 3742 and 28 U.S.C. § 1291. On November 17, 2005, the Eleventh Circuit vacated and remanded the sentence imposed by the district court but dismissed and/or affirmed the district court's decision as to Mr. James' cross appeal.

Jurisdiction to entertain this appeal is invoked by the timely filing of this petition within the prescribed 90 days after entry of the judgment. *See* 28 U.S.C. § 1254(1); S. Ct. R. 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people

U.S. CONST., ART. I, § 8, 18 U.S.C. § 922, and **18 U.S.C. § 924** are reprinted in their entirety in Appendices B, C, and D, respectively.

STATEMENT OF THE CASE

Material Facts

Mr. James has been convicted of the following felony offenses: (a) attempted burglary of a dwelling in violation of Florida Statutes, §§ 810.02 and 777.04, on June 3, 1997; (b) possession of cocaine in violation of Florida Statutes, § 893.13 and trafficking in illegal drugs in violation of Florida Statutes, § 893.135, on January 28, 1998; and (c) trafficking possession in cocaine in violation of Florida Statutes, § 893.135, on June 29, 1998.

On January 31, 2003, Mr. James was found in possession of an F.E.G., Model Mark II APK, .380 caliber semi-automatic pistol and Remington .380 caliber ammunition in Fort Myers, Florida. Both the gun and bullets were manufactured outside the State of Florida.

At sentencing, Mr. James argued that he was not subject to an enhanced sentence under the Armed Career Criminal Act (ACCA) because he only had one countable conviction. Specifically, Mr. James argued that his attempted burglary conviction was not a prior violent felony under § 924(e)(2)(B). Further, he argued that his conviction for possession of over 200 grams but less than 400 grams of cocaine was not a serious drug offense under § 924(e)(2)(A). The government argued that both of these convictions satisfied the requirements under § 924(e).

The district court held that Mr. James' attempted burglary conviction was a violent felony under § 924(e)(2)(B). However, the district court held that Mr. James' conviction for possession of between 200 and 400 grams of cocaine (trafficking possession) was not a serious drug offense under § 924(e)(2)(A). Specifically, the district court found:

> [B]ased upon the circumstances set forth in the information, this case **does not involve**, as far as we know, the manufacturing, distributing or possessing with intent to manufacture or distribute cocaine; and the Court finds, therefore, that this is not a serious drug offense within the meaning of Section 924(e).

(Doc 68 - Pg 63)(emphasis added).

Based on the district court's rulings, Mr. James did not qualify as an armed career criminal because he only had two, instead of the requisite three, prior qualifying convictions.

The government appealed the district court's ruling as to the trafficking possession conviction. Mr. James cross appealed the district court's ruling as to the attempted burglary. The Eleventh Circuit held that Mr. James convictions for trafficking possession of cocaine and attempted burglary both qualified under 18 U.S.C. § 924(e) as predicate offenses. *See James*, 430 F.3d at 1156-1157.

Basis for Federal Jurisdiction

By an indictment filed June 25, 2003, the government charged Alphonso James, Jr., with possession of a firearm by a convicted felon. On January 13, 2004, Mr. James pled guilty as charged.

At sentencing, the district court questioned whether two prior convictions would subject Mr. James to be sentenced under 18 U.S.C. § 924(e).[1] As to the prior conviction for attempted burglary, the district court ruled that the conviction counted under § 924(e). As to the prior conviction for trafficking possession in cocaine, the district court found that, under Florida law, trafficking possession in cocaine did not involve any intent to manufacture or distribute. As such, the district court held that Mr. James' conviction for trafficking possession in cocaine did not count as a serious

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[1] One previous conviction for a serious drug offense was not contested.

drug offense. Based on the district court's analysis, Mr. James only had two qualifying prior convictions under § 924(e), and thus, the district court sentenced Mr. James under § 924(a)(2) to 71 months' imprisonment, to be followed by a three-year term of supervised release.

The government appealed. Mr. James filed a cross appeal.

On appeal, the government argued that Mr. James' conviction for trafficking possession of cocaine qualified as a serious drug offense. On cross appeal, Mr. James argued that his conviction for attempted burglary was not a qualifying offense under the statute, that 18 U.S.C. § 922(g) was unconstitutional, and that the district court did not err in finding that Mr. James' conviction for trafficking possession in cocaine was not a serious drug offense. On November 17, 2006, the Eleventh Circuit held that Mr. James' conviction for trafficking possession of cocaine was a serious drug offense, that his conviction for attempted burglary was a violent felony, and that the constitutional challenge to the statute was not considered because it was not raised in the district court. *See James*, 430 F.3d at 1153 n.1, 1156-1157.

This petition follows.

REASONS FOR GRANTING THE WRIT

Issue I

The Eleventh Circuit erred by holding that a state drug conviction, which did not necessarily involve manufacturing, distributing, or possessing with intent to manufacture or distribute, qualified as a serious drug offense under 18 U.S.C. § 924(e), in violation of *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005).

The Eleventh Circuit held that Mr. James' conviction in Florida for possession of between 200 and 400 grams of cocaine was a serious drug offense under 18 U.S.C. § 924(e). *See James*, 430 F.3d at 1156. Mr. James submits that the Eleventh Circuit erred in its decision.

The ACCA provides a mandatory sentence for a person who violates § 922(g) and has three prior convictions for a violent felony or serious drug offense, or both. *See* 18 U.S.C. § 924(e). The statute defines a serious drug offense as:

> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . ., for which a maximum term of imprisonment of ten years or more is prescribed by law.

18 U.S.C. § 924(e)(2)(A). The definition of a qualifying state offense under the ACCA is a matter of federal law. *See Taylor v. United States*, 495 U.S. 575, 590-591 (1990). This Court further stated that in deciding whether a crime is a serious drug offense, sentencing courts should look to the statutory definition of the crime charged, rather than the actual facts of the individual's prior conviction. *Id.* at 600-602. This categorical approach, which is consistent with the statutory language as

well as the legislative history of the ACCA, is designed to avoid "the practical difficulties and potential unfairness of a factual approach" to each prior conviction. *Id.* at 601. Furthermore, this Court has restricted the type of documents the sentencing court can consider in determining whether a conviction is a qualifying offense. *See Shepard v. United States,* 544 U.S. 13, ___, 125 S. Ct. 1254, 1263 (2005)(rejecting the government's contention that police reports could be used, this Court held that the inquiry permitted under *Taylor* "is limited to the terms of the charging document, the terms of the plea agreement or transcript of the factual colloquy between the judge and the defendant in which the factual basis for the plea was confirmed by the defendant, or some comparable judicial record of this information").

In *Taylor*, this Court considered whether the defendant's prior conviction for burglary under Missouri law qualified as a burglary under § 924(e)(2)(B)(ii). The Court held first that the federal statute refers not to common law burglary, but rather "generic burglary," which includes "the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor*, 495 U.S. at 599. This Court also observed that where the state statute is broader than the generic definition, such as burglary statutes which include entry of an automobile as well as a building, "if the indictment or information and jury instructions show that the defendant was only charged with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement." *Id.* at 602.

In applying the categorical approach required under *Taylor*, it is clear that under Florida law, mere possession of cocaine does not qualify as a serious drug

offense. A state offense only becomes a serious drug offense under the ACCA when the offense involves manufacturing, distributing, or possessing with intent to manufacture or distribute **and** the maximum term of imprisonment for the offense is ten years or more. Failure to meet either prong means that the offense is not a serious drug offense for purposes of the enhancement under the ACCA.

Florida law provides many ways to prove drug trafficking. Specifically, a person trafficks in cocaine if he or she sells, purchases, manufactures, delivers, or brings into the state, **or** who is in actual or constructive possession of 28 grams or more of cocaine. *See* Fla. Stat. § 893.135(b)(1). The statute provides for an increased sentence if the amount of cocaine is 200 or more grams, but less than 400 grams. *See* Fla. Stat. § 893.135(b)(1)(b).

In *Gibbs v. State*, 698 So.2d 1206, 1206 (Fla. 1997), the Florida Supreme Court was asked to address whether a person could be separately convicted and punished for trafficking possession of cocaine and simple possession of a controlled substance for the same quantity of cocaine. The Florida Supreme Court held that the elements in the statute prohibiting trafficking possession were not different from the elements in the statute prohibiting simple possession. *Id.* at 1208-1209. By so holding, the Court found that the quantity requirement of trafficking possession was not a separate element, thus, a State was not allowed the dual prosecution of both trafficking possession and simple possession arising out of the possession of the same cocaine. *Id.* at 1209. Additionally, the Court stated that "the gravamen of the crime underlying each statute is the possession of an illegal drug." *Id.*

More important, however, the Court stated that:

The conduct element of the drug trafficking statute is not compared by

> considering the entire range of conduct including possession, sale, purchase, and delivery, but rather by comparing only trafficking possession with simple possession. This is a different situation from a case in which the defendant is charged with both trafficking sale and simple possession, because the sale element of the trafficking statute differs from the elements in the simple possession statute.

Id. at 1209-1210. The Florida Supreme Court clearly indicates that trafficking possession in Florida does not involve distribution or manufacture, or the intent to distribute or manufacture.

Although the possession of a large quantity of drugs might lead to an inference that the person intended to distribute or manufacture the drugs, Florida law does not require the inference as a matter of law. Under the categorical approach required under *Shepard* and *Taylor*, and because the government failed to provide any admissible documents that Mr. James' drug conviction really did involve the manufacturing, distributing, or possessing with intent to manufacture or distribute cocaine, Mr. James' drug conviction was not a serious drug offense under the statute.

As such, this Court should grant his petition for a writ of certiorari.

Issue II

The Eleventh Circuit erred by holding that all convictions in Florida for attempted burglary qualify as a violent felony under 18 U.S.C. § 924(e), creating a circuit conflict on the issue.

The ACCA provides a mandatory sentence for a person who violates § 922(g) and has three prior convictions for a violent felony or a serious drug offense, or both. *See* 18 U.S.C. § 924(e). The statute defines a violent felony as:

> [A]ny crime punishable by imprisonment for a term exceeding one year . . . that–
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

18 U.S.C. § 924(e)(2)(B). The definition of a qualifying state offense under the ACCA is a matter of federal law. *See Taylor*, 495 U.S. at 590-591. This Court further stated that in deciding whether a crime is a violent felony under either subparagraph of § 924(e)(2)(B), sentencing courts should look to the statutory definition of the crime charged, rather than the actual facts of the individual's prior conviction. *Id.* at 600-602. This categorical approach, which is consistent with the statutory language as well as the legislative history of the ACCA, is designed to avoid "the practical difficulties and potential unfairness of a factual approach" to each prior conviction. *Id.* at 601.

The issue presented in this petition is whether a conviction in Florida for attempted burglary always qualifies as a predicate offense under § 924(e). As recognized in *United States v. Strahl*, 958 F.2d 980, 985-986 (10th Cir. 1992), Congress did not specifically include convictions for attempted burglaries as

predicate offenses under § 924(e). "Yet, in the language immediately preceding the burglary provision, Congress did expressly include 'attempted use . . . .of physical force' as a predicate offense to enhancement." *Strahl*, 958 F.2d at 986 (citing 18 U.S.C. § 924(e)(2)(B)(i)). Moreover, in two previous versions of the ACCA that were passed by the Senate but never enacted into law, the predicate offenses specifically included attempted burglaries. *See* 130 Cong.Rec. 3,100 (1984)(Senate bill 52 provided federal criminal offense for "[w]hoever carries a firearm during the commission of a robbery or burglary offense . . ., or attempts or conspires to do so," after two prior convictions for "any robbery or burglary offense, or a conspiracy or attempt to commit such an offense"); 128 Cong.Rec. 26,436 (1982)(Senate bill 1688 provided federal criminal offense for "[a]ny person who while he or any other participant in the offense is in possession of or has readily available any firearm or imitation thereof, commits, or conspires or attempts to commit robbery or burglary . . ." after two prior convictions for "robbery or burglary, or an attempt or conspiracy to commit such an offense").[2] Because, Congress did not specifically include attempted burglary as a violent offense when it specified burglary as a violent felony, attempted burglary can only be a predicate offense if it "otherwise involves conduct that presents a serious risk of physical injury to another."[3] 18 U.S.C. § 924(e)(2)(B)(ii).

Before delving into cases addressing the issue, it is necessary to review the

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[2] For a more thorough history of the ACCA, *see Strahl*, 958 F.2d at 985-986.

[3] Additionally, attempted burglary would not qualify under the first subparagraph of § 924(e)(2)(B), as attempted burglary in Florida does not require the use or threat of use of physical force in order to convict a defendant.

elements of attempted burglary in Florida: (1) the intent to commit burglary,[4] and (2) some overt act directed toward its commission. *See Jones v. State*, 608 So.2d 797, 798 (Fla. 1992). In contrast to several states, Florida does not require that the defendant come within dangerous proximity to success to be convicted under the attempt statute. *See United States v. Weekley*, 24 F.3d 1125, 1127 n.2 (9th Cir. 1994).

A circuit split exists whether an attempted burglary convictions qualifies under the ACCA. *See United States v. Martinez*, 954 F.2d 1050, 1053-1054 (5th Cir. 1992)(holding that attempted burglary conviction from Texas did not qualify); *Strahl*, 958 F.2d at 986 (holding that attempted burglary conviction from Utah did not qualify); *Weekley*, 24 F.3d at 1126-1127 (holding that attempted burglary conviction from Washington did not qualify). *But see United States v. Davis*, 16 F.3d 212, 217 (7th Cir. 1994)(holding that attempted burglary under Illinois law did qualify); *United States v. Custis*, 988 F.2d 1355, 1364 (4th Cir. 1993)(holding that attempted burglary under Maryland law did qualify); *United States v. Lane*, 909 F.2d 895, 903 (6th Cir. 1990))(holding that attempted burglary under Ohio law did qualify); *United States v. Demint*, 74 F.3d 876, 877-878 (8th Cir. 1996)(holding that attempted burglary under Florida law did qualify).

In *Martinez*, the government argued that the defendant's convictions for attempted burglary were the equivalent to burglary convictions. *Martinez*, 954 F.2d at 1052. The Fifth Circuit rejected the argument. The court initially examined the definition of burglary for purposes of § 924(e) under *Taylor*:

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[4] For offenses committed on or before July 1, 2001, burglary means entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein. *See* Fla. Stat. § 810.02(1)(a).

> "[A] person has been convicted of burglary for purposes of a § 924(e) enhancement if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime."

Id. at 1052-1053 (quoting *Taylor*, 495 U.S. at 599, 110 S. Ct. at 2158). Based on *Taylor*'s definition of burglary, the court easily concluded under Texas law, "attempted burglary does not demonstrate, as a matter of law, that those convictions included the essential elements of entry into a building." *Id.* As such, attempted burglary did not qualify under the first part of subparagraph § 924(e)(2)(B)(ii).

Additionally, the court rejected the argument that attempted burglary presented a serious potential risk of physical injury to another. First, the court stated that if Congress had wished to include attempted burglary as a predicate offense, it could have done so. *Id.* at 1053. Second, the court noted that because attempted burglary did not require entry into the building, "it simply does not present the same danger that is presented by burglary." *Id.* Accordingly, "while attempted burglary does indeed present some risk of potential harm, that risk does not rise to the same level of risk presented by burglary." *Id.* at 1054. Finally, under Texas law, a defendant who had taken steps toward the commission of the burglary could be arrested far from the target of the burglary and still be convicted of the attempt.[5] Thus, the court concluded that the fact that the defendant did not complete the burglary offense "does indeed reduce the potential risk of injury to others." *Id.*

In *Weekley*, the Ninth Circuit similarly rejected the argument that attempted burglary posed a serious potential risk of physical injury to another. The court began

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[5] This is similar to the law of attempted burglary in Florida. *See Jones*, 608 So.2d at 798.

by analyzing the contrary opinions by other circuits. The court characterized the Seventh and Fourth Circuits as allowing an attempted burglary conviction to operate as a predicate "if *most* attempt convictions would meet a threshold level of risk." *Weekley*, 24 F.3d at 1126 (emphasis in original). In contrast to these circuits, the Tenth and Fifth Circuit required "*every* attempt conviction to meet the threshold level of risk." *Id.* (emphasis in original). The Ninth Circuit found that the approach taken by the Fifth and Tenth Circuits was more consistent with the categorical approach required under *Taylor*. *Id.* In applying this approach, the court found that Washington allowed an attempted burglary conviction "for relatively unrisky 'substantial step' conduct." *Id.* at 1127. As such, the attempted burglary conviction could not serve as a predicate offense under § 924(e).

The Eleventh Circuit rejected the position Mr. James advocated and also rejected the Fifth and Ninth Circuits' position on the issue. *See James*, 430 F.3d at 1156-1157. Instead, the court adopted the position of the Eighth Circuit and held that attempted burglary in Florida presents a potential risk of physical injury. In *Demint*, the Eighth Circuit cited to some older Florida cases and concluded that "Florida's attempted burglary law punishes only 'conduct that presents a serious potential risk of physical injury to another.'" *Demint*, 74 F.3d at 878. Mr. James submits that the Eighth Circuit erred in its analysis, especially due to the fact that the court failed to acknowledge a 1992 decision by the Florida Supreme Court. In *Jones*, the Florida Supreme Court defined attempted burglary. *Jones*, 608 So.2d at 798. Nowhere in the elements of attempted burglary does Florida require that the defendant gain entry to

a dwelling,[6] nor does Florida require that the conduct present any risk of physical injury whatsoever. Therefore, the Eighth Circuit's conclusion to the contrary was not in conformity with Florida law.

As the Ninth Circuit has stated: "A risk is a risk. But a risk of a risk is not enough of a risk." *Weekley*, 24 F.3d at 1125. Under Florida law, attempted burglary is just a risk of a risk. Florida law does not require that a defendant come within dangerous proximity to success to be convicted under the attempt statute. Due to the circuit conflict, this Court should grant his petition for a writ of certiorari.

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[6] In fact, a person would be not guilty of attempted burglary if he or she actually gained entrance to the dwelling. *See Pepitone v. State*, 846 So.2d 640, 642 (Fla. 2d DCA 2003).

Issue III

The felon-in-possession statute, 18 U.S.C. § 922(g), is facially invalid because Congress failed to define commerce as interstate or foreign commerce. Additionally, whether the statute is unconstitutional because Congress acted beyond the power of the commerce clause by failing to require a substantial nexus.

Although the felon-in-possession statute has previously been found valid by this Court, this Court has not expressly addressed whether 18 U.S.C. § 922(g) is unconstitutional on its face. Specifically, the statute requires possession of a gun in or affecting commerce but neither § 922, § 921 (the preceding definitional section of the statute), nor § 10 (the general definitional section of the statute) limits commerce to interstate or foreign commerce. Mr. James is also challenging the constitutionality of the statute on the ground that the statute is invalid because Congress acted beyond the power of the commerce clause by failing to require a substantial nexus.

A. Statute Facially Invalid

Section 922(g) is unconstitutional because it requires possession of a firearm "in or affecting commerce" but neither § 922, § 921 (definitional section preceding the statute), nor § 10 (general definitional section of Title 18) limits commerce to "interstate commerce."

Under the general definitional section of Title 18, section 10 defines only interstate and foreign commerce. *See* 18 U.S.C. § 10. The term "commerce" by itself is not defined in the section. Additionally, under § 921, the term "interstate or foreign commerce" is defined. However, throughout Title 18, the term commerce by itself is never defined (*i.e.*, commerce is never defined as "interstate or foreign commerce").

Thus, the term commerce in § 922(g) could refer to purely intrastate commerce, or interstate commerce, or foreign commerce. The statute is unclear as to the type of commerce required.

A brief examination of the entire statute (*i.e.*, all of 18 U.S.C. § 922) is quite revealing. In § 922(a)(1) - ship, transport, or receive any firearm - Congress limited the use of this section of the statute to "interstate or foreign commerce." *See* 18 U.S.C. § 922(a)(1). In § 922(a)(2) - ship or transport firearm to person other than licensed person - Congress limited the use of this section to "interstate or foreign commerce." 18 U.S.C. § 922(a)(2). In § 922(e) - deliver to common or contract carrier for transportation of shipment - Congress limited the use of this section to "interstate or foreign commerce." *See* 18 U.S.C. § 922(e). In § 922(f)(1) and (2) - common or contract carrier to transport or deliver - Congress limited the use of these sections to "interstate or foreign commerce." *See* 18 U.S.C. § 922(f)(1) and (2). Even in § 922(g), Congress limited the use of this section of the statute in certain parts to "interstate or foreign commerce." Specifically, § 922(g) states that:

> It shall be unlawful for any person-- . . . to ship or transport in **interstate or foreign commerce**, or possess in or affecting **commerce**, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in **interstate or foreign commerce.**

18 U.S.C. § 922(g) (emphasis added). Only the part dealing with possessing a firearm or ammunition fails to limit the use of the statute to "interstate or foreign commerce." Continuing a review of § 922 would find a consistent limitation; specifically, each section of the statute limits the use of the statute to interstate or foreign commerce except in § 922(g) dealing with the possession of a firearm or ammunition. Without this limitation, the felon-in-possession statute is facially invalid because the statute

is inconsistent with the power granted to Congress by the commerce clause.

The Eleventh Circuit rejected the same issue as to the facial validity of 18 U.S.C. § 922(g) in *United States v. Nichols*, 124 F.3d 1265 (11th Cir. 1997). In *Nichols*, the court stated that the Supreme Court "has held that the phrase 'in or affecting commerce' indicates a Congressional intent to assert its full Commerce Clause power." *Id.* at 1266. Mr. James respectfully submits that *Nichols* was wrongly decided.[7]

B. *United States v. Lopez*

Assuming that this Court does not find the statute facially invalid, this Court should still find the statute unconstitutional because Congress acted beyond the power of the commerce clause by failing to require that the possession of the firearm by a felon substantially affect interstate commerce. In 1995, this Court clarified the proper analysis of commerce clause power. *See United States v. Lopez*, 514 U.S. 549 (1995). In his concurring opinion in *Lopez*, Justice Thomas noted that:

> [T]he power to regulate "commerce" can by no means encompass authority over **mere gun possession**, any more that it empowers the Federal Government to regulate marriage, littering, or cruelty to animals, throughout the 50 states. Our Constitution quite properly leaves such matters to the individual States, notwithstanding these activities' on interstate commerce.

Id. at 585 (Thomas, J., concurring)(emphasis added).

However, circuit courts considering the constitutionality of § 922(g)(1) have failed to heed Justice Thomas' words. Appellate courts, including the Eleventh

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[7] In the present case, the Eleventh Circuit rejected Mr. James' argument stating that it would not be considered by the court because it was raised for the first time on appeal. *See James*, 430 F.3d at 1153 n.1. Rather than declining to consider the issue, the Eleventh Circuit should have reviewed the claim for plain error. *See United States v. Olano*, 507 U.S. 725 (1993)

Circuit, have thus far declined to follow the teachings of *Lopez* to find that this statute is an unconstitutional exercise of commerce clause power. *See, e.g., United States v. McAllister*, 77 F.3d 387, 390 (11th Cir. 1996); *United States v. Wells*, 98 F.3d 808, 811 (4th Cir. 1996)(listing cases in accord).

C. Commerce Clause Power

The Tenth Amendment to the Constitution reserves to the States all powers not specifically granted to the federal government. The "powers delegated by the [proposed] Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Lopez*, 514 U.S. at 552 (quoting *The Federalist No. 45*, pp. 292-293 (C. Rossiter ed. 1961)). One of the powers the Constitution grants Congress is the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST., ART. I, § 8, cl. 3.

Lopez identified three areas of activity that Congress may regulate under the commerce clause: 1) use of channels of interstate commerce; 2) instrumentalities of interstate commerce, or people or things in interstate commerce; and 3) activities having a substantial relationship to commerce. *Lopez*, 514 U.S. at 557-561. As for the third category, this Court admitted that its case law "has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause." *Id.* at 559. This Court concluded that the proper analysis is whether the targeted activity **substantially affects** interstate commerce. *Id.*

As Justice Thomas did in his concurrence, the majority in *Lopez* stressed that the federal commerce power should not be expanded to obliterate the distinction

between national and local government. *Id.* at 555-558. The States possess primary authority for defining and enforcing criminal law. *Id.* at 561 n.3. For Congress to enact a criminal statute to address conduct already prohibited by the states would significantly change the federal-state balance. *See United States v. Bass*, 404 U.S. 336, 349-350 (1971). Here, Florida has already made it unlawful for a convicted felon to possess a weapon. *See* Fla. Stat. § 790.23.

The *Lopez* Court also recognized the suggestion in its commerce clause cases that only a minimal connection with commerce was required. However, *Lopez* emphasized that the Court has never "declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Lopez*, 514 U.S. at 558. "[O]nly where *a general regulatory statute bears a substantial relation to commerce*, the *de minimis* character of individual instances arising under that statute is of no consequence." *Id.* (emphasis in original).

Most circuit courts considering § 922(g) after *Lopez* have found that the jurisdictional phrase "in or affecting commerce" saves the statute. *E.g., McAllister*, 77 F.3d at 390; *United States v. Bell*, 70 F.3d 495, 498 (7th Cir. 1995); *United States v. Lewis*, 100 F.3d 49, 51 (7th Cir. 1996). This language does not make § 922(g) constitutional because it does not require a substantial effect on commerce. Without a requirement of substantial effect on commerce, the statute in essence only regulates "mere possession." Such mere possession of a firearm by a convicted felon, like possession of a firearm in a school zone, is not "an essential part of a larger regulation of economic activity, in which the regulatory scheme will be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561. This statute, like §

922(q), cannot be upheld as regulating activity that arises out of or is connected with a commercial transaction, which viewed in the aggregate, substantially affects commerce. *See id.* Possession of a firearm, in and of itself, does not affect commerce, even in the aggregate.

D. Individual Nexus

Furthermore, in *Bass*, this Court considered 18 U.S.C. § 1202(a) - the forerunner to § 922(g) - and held that the government must prove an interstate nexus in each case. *Bass*, 404 U.S. at 348. Without that proof in each case, the statute would impermissibly intrude on the criminal jurisdiction of states. *Id.* at 350. *Bass* suggested that the government could prove the interstate nexus for possession "if at the time of the offense the gun was moving interstate or on an interstate facility, or if the possession affects commerce." *Id.*

However, in *Scarborough v. United States*, 431 U.S. 563, 570-577 (1977), this Court held that the government could establish the nexus by showing that the firearm had traveled in interstate commerce at some point before the felon's possession. Thus, the government generally, as here, simply presents evidence that the guns were manufactured in another state. However *Scarborough*'s holding is questionable because it found that Congress intended only a **minimal** nexus with interstate commerce. *Id.* at 577. It is clear now, after *Lopez*, that the Constitution requires a substantial connection with commerce to support federal jurisdiction. In two federal arson cases after *Lopez*, the Eleventh Circuit and the Ninth Circuit recognized that *Lopez* requires the government to establish the substantial impact on commerce in each individual case. *United States v. Denalli*, 73 F.3d 328 (11th Cir.), *amended in part*, 90 F.3d 444 (1996); *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir.

1995). These cases both addressed the sufficiency of evidence for arson of private homes.

- The language of the federal arson statute is similar to that of § 922(g) because it prohibits destruction of property "used in interstate or foreign commerce or in an activity affecting interstate or foreign commerce." 18 U.S.C. § 844(i). The Ninth Circuit concluded that:

> [W]here Congress seeks to regulate a purely intrastate noncommercial activity that has traditionally been subject to exclusive regulation by state or local government, and where the connection of the regulated activity as a whole to interstate commerce is neither readily apparent nor illuminated by express congressional findings, the government must satisfy the jurisdictional requirement by pointing to a "substantial" effect on or connection to interstate commerce.

Pappadopoulos, 64 F.3d at 527. The Eleventh Circuit similarly found that the government had to prove that the destruction of a private home had a substantial effect on commerce. *Denalli*, 90 F.3d at 444.

So far, the Eleventh Circuit has declined to apply this evidentiary requirement to § 922(g), finding the movement across state lines to be a sufficient impact. *E.g., McAllister*, 77 F.3d at 390. The court continues to rely on *Scarborough*, despite the clear holding of *Lopez* that a substantial impact is required. However § 922(g), like the federal arson statute, is not an economic or regulatory statute; it is a criminal statute, with a commerce element similar to that of the arson statute. There is no reason not to require the same federal nexus for § 922(g) as for the arson statute. Proof of a **substantial** impact on commerce should be required in each individual case.

The *Lopez* court acknowledged that it has previously reserved the question whether Congress could constitutionally regulate the "mere possession" of firearms.

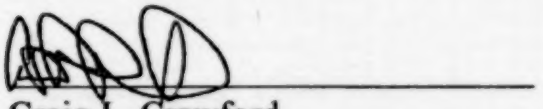
Lopez, 514 U.S. at 562. That is essentially what § 922(g) does. The statute is unconstitutional. Or, if the statute is constitutional, it can only be so if the government is required to show a substantial effect on commerce in each individual case.

CONCLUSION

Based on the foregoing reasoning and citations of authority, Mr. James requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted this 14th day of February, 2006.

R. Fletcher Peacock
Federal Public Defender



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APPENDIX A

Opinion of the Eleventh Circuit Court of Appeals, vacating and remanding Mr. James' sentence in *United States v. James,* No. 04-12915, 430 F.3d 1150 (11th Cir. November 17, 2005)

Briefs and Other Related Documents

United States Court of Appeals,
Eleventh Circuit.
UNITED STATES of America, Plaintiff-Appellant-Cross-Appellee,
v.
Alphonso JAMES, Jr., Defendant-Appellee-Cross-Appellant.
No. 04-12915.

Nov. 17, 2005.

Background: Defendant was convicted of possessing firearm after having previously been convicted of felony by the United States District Court for the Middle District of Florida, No. 03-00072-CR-FTM-29-DNF, John E. Steele, J., which denied government's request for sentencing as armed career criminal, and both sides appealed.

Holdings: The Court of Appeals, Wilson, Circuit Judge, held that:
(1) defendant's prior conviction of Florida offense of trafficking in cocaine by possessing more than 28 grams thereof qualified as "serious drug offense," for purpose of sentencing under the Armed Career Criminal Act (ACCA); and
(2) defendant's prior conviction of Florida offense of attempted burglary presented potential risk of physical injury, and thus qualified as "violent felony," for purpose of sentencing under the ACCA.
Vacated and remanded.

West Headnotes

[1] Criminal Law ⇐1139
110k1139
Court of Appeals reviews *de novo* whether defendant's prior conviction was for "violent felony" or for "serious drug offense," for sentencing purposes under the Armed Career Criminal Act (ACCA). 18 U.S.C.A. § 924(e).

[2] Sentencing and Punishment ⇐1273
350Hk1273
Defendant's prior conviction of Florida offense of trafficking in cocaine by possessing more than 28 grams thereof qualified as "serious drug offense," for purpose of sentencing under the Armed Career Criminal Act (ACCA), though this state law offense did not have as express element the manufacture, distribution, or possession with intent to manufacture or distribute cocaine; Florida legislature, in making trafficking offenses the most serious offense under Florida's three-tiered scheme, necessarily inferred intent to distribute based on quantity of drugs that defendant needed to possess to be guilty of trafficking therein. 18 U.S.C.A. § 924(e); West's F.S.A. § 893.135(1)(b)(1)(b).

[3] Sentencing and Punishment ⇐1257
350Hk1257
To determine whether particular offense is "serious drug offense," for purpose of sentencing under the Armed Career Criminal Act (ACCA), sentencing courts adopt a categorical approach and look only to statutory definition of crime, rather than to actual facts of defendant's prior conviction. 18 U.S.C.A. § 924(e).

[4] Federal Courts ⇐404
170Bk404
Whether defendant's prior state law offense qualifies as "serious drug offense," for purpose of sentencing under the Armed Career Criminal Act (ACCA), is matter of federal law. 18 U.S.C.A. § 924(e).

[5] Sentencing and Punishment ⇐1273
350Hk1273
Defendant's prior state law offense may qualify as "serious drug offense," for purpose of sentencing under the Armed Career Criminal Act (ACCA), even though this state law offense does not have as element the manufacture, distribution or possession of drugs with intent to manufacture or distribute. 18 U.S.C.A. § 924(e).

[6] Sentencing and Punishment ⇐1285
350Hk1285
Defendant's prior conviction of Florida offense of attempted burglary presented potential risk of physical injury, and thus qualified as "violent felony," for purpose of sentencing under the Armed Career Criminal Act (ACCA). 18 U.S.C.A. § 924(e)(2)(B).
***1151** Karin B. Hoppmann, Tampa, FL, Jeffrey F. Michelland, Fort Myers, FL, for U.S.

Craig L. Crawford and R. Fletcher Peacock, Fed. Pub. Defenders, Orlando, FL, Martin Derovanesian, Asst. Fed. Pub. Def., Fort Myers, FL, for James.

Appeals from the United States District Court for the Middle District of Florida.

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Before BLACK, WILSON and COX, Circuit Judges.

WILSON, Circuit Judge:

This appeal addresses whether certain Florida state convictions qualify as predicate felony convictions under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). Alphonso James, Jr. was indicted for possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). At sentencing, the district court found that two of James's *1152 previous felony convictions qualified as predicate convictions under the ACCA, but rejected a third conviction, and therefore, did not enhance James's sentence under the ACCA. The United States ("the Government") appeals the district court's ruling. James cross-appeals, challenging the district court's decision to count one of his previous convictions as a qualifying felony under the ACCA. James also argues that § 922(g) is unconstitutional.

We hold that the district court erred when it held that James's Florida conviction for trafficking in cocaine by possession of between 200 and 400 grams of cocaine was not a predicate conviction under the ACCA. We therefore vacate the sentence imposed and remand, directing the district court to sentence James in accordance with the ACCA.

I. BACKGROUND

In June of 2003, the Government charged James with possession of a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). James pled guilty as charged.

The Government sought to have James's sentence enhanced under the ACCA, 18 U.S.C. § 924(e). The ACCA provides a mandatory minimum term of imprisonment of 15 years for any person who violates 18 U.S.C. § 922(g) after three convictions in either federal or state court for a "violent felony" or "serious drug offense." *See* § 924(e). In 1997, James was convicted in a Florida state court of attempted burglary of a dwelling, in violation of Florida Statute §§ 810.02 and 777.04. In 1998, James was convicted in Florida state court of trafficking in illegal drugs in violation of Florida Statute § 893.135. Later that year, James was again convicted in Florida state court under the same statute for trafficking in cocaine by possession of between 200 and 400 grams of cocaine. Based on James's three prior felony convictions, the probation officer recommended that James be sentenced as an armed career criminal under the ACCA.

At sentencing, James objected, arguing that neither his attempted burglary conviction, nor his trafficking by possession conviction, should count as a predicate conviction under the ACCA. The district court concluded that James's attempted burglary conviction was a "violent felony" under § 924(e)(2)(B) of the ACCA. The district court also concluded, however, that James's trafficking by possession conviction did not qualify as a "serious drug offense" under § 924(e)(2)(A) of the ACCA, reasoning that the Florida statute under which James was convicted did not include as an element of proof that James had intended to distribute his 200 to 400 grams of cocaine. Therefore, the district court refused to enhance James's sentence under the ACCA because he did not qualify as an armed career criminal, as he had only two predicate convictions. The district court sentenced James to 71 months' imprisonment, followed by 36 months' supervised release.

The Government now appeals the district court's decision not to count James's trafficking by possession conviction as a "serious drug offense" for purposes of sentencing him under the ACCA. James cross-appeals, challenging the district court's decision to count his attempted burglary conviction as a "violent felony." James further argues that § 922(g) is unconstitutional either facially, or as applied to him, because it exceeds Congress's authority under the Commerce Clause.

II. DISCUSSION

*1153 [1] There are two issues on appeal: [FN1] (1) whether the district court erred by failing to count James's conviction for trafficking in cocaine by possession of between 200 and 400 grams of cocaine as a "serious drug offense" under the ACCA; and (2) whether the district court erred by counting James's conviction for attempted burglary of a dwelling as a "violent felony" under the same statute. We review *de novo* whether a conviction is a "violent felony" or a "serious drug offense" within the meaning of § 924(e). *United States v. Wilkerson*, 286 F.3d 1324, 1325 (11th Cir.2002) (per curiam).

FN1. James raises his argument that § 922(g) is unconstitutional for the first time on appeal. "This Court has repeatedly held that an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court." *Access Now, Inc. v. Southwest Airlines Co.*, 385

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F.3d 1324, 1331 (11th Cir.2004) (internal quotations omitted). Therefore, James has failed to preserve this claim, and we will not address it.

A. Whether Trafficking in Cocaine by Possession of between 200 and 400 Grams of Cocaine is a "Serious Drug Offense"

[2] The Government argues that the district court erred by failing to count James's Florida state conviction for trafficking in cocaine by possession of between 200 and 400 grams of cocaine as a "serious drug offense" under the ACCA. The ACCA defines a "serious drug offense" as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance ..., for which a maximum term of imprisonment of ten years or more is prescribed by law." § 924(e)(2)(A)(ii).

The Florida Statute under which James was convicted, section 893.135(1)(b)(1)(b), reads as follows:

> Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine, as described in § 893.03(2)(a)4., or of any mixture containing cocaine, but less than 150 kilograms of cocaine or any such mixture, commits a felony of the first degree, which felony shall be known as "trafficking in cocaine,".... If the quantity involved:
>
> ...
>
> b. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of $100,000.

The district court concluded that the statute did not satisfy the ACCA's requirement that the offense involve the "intent to manufacture or distribute," § 924(e)(2)(A)(ii), because the Florida statute does not have "as an element" of the offense an intent to manufacture or distribute.

On appeal, the Government argues that Congress defined a "serious drug offense" under the ACCA to include any state offense "involving" the intent to distribute, not only those offenses having "as an element" such intent. In support, the Government cites *United States v. Madera-Madera*, 333 F.3d 1228 (11th Cir.2003), *cert. denied*, 540 U.S. 1026, 124 S.Ct. 589, 157 L.Ed.2d 447 (2003), in which we rejected the district court's reasoning in an analogous context. In *Madera-Madera*, the defendant committed a prior offense of possession of 87 grams of methamphetamine, a violation of a Georgia law prohibiting the possession of 28 grams or more of the drug. *Id.* at 1231. We had to determine whether such an offense qualified as *1154 a "drug trafficking offense" for purposes of enhancement under the Sentencing Guidelines. *Id.* Although Georgia law expressly designated the defendant's offense as drug "trafficking," the defendant argued that the offense should not be considered a trafficking offense under the Sentencing Guidelines because he merely possessed the drugs. *Id.* We rejected this argument for several reasons. *Id.*

We explained that Georgia enacted a three-tiered scheme for punishing drug crimes: (1) possession of any amount; (2) possession with the intent to distribute any amount; and (3) "trafficking" by possession of more than 28 grams. *Id.* Further, we concluded that such a scheme necessarily recognizes that someone who is convicted of drug trafficking, the offense to which the defendant pled guilty, "plans on distributing and thereby 'trafficking' those drugs. In making possession of 28 grams of methamphetamine a 'trafficking' offense, Georgia's trafficking statute necessarily infers an intent to distribute once a defendant possess a certain amount of drugs." *Id.* at 1232. The Government here argues that Florida has nearly an identical three-tiered scheme, and therefore, we should apply our reasoning in *Madera-Madera* to hold that Florida's drug trafficking statute also infers an intent to distribute.

In response, James relies on *Gibbs v. State*, 698 So.2d 1206 (Fla.1997), a case that the district court referenced when making its ruling. In *Gibbs*, the Florida Supreme Court held that Florida convictions for both simple possession of cocaine and drug trafficking by possession of cocaine based on the same conduct violated the Double Jeopardy Clause because none of the elements of the drug trafficking statute differed from the elements of the simple possession statute. *Id.* at 1208-10. James argues that this case indicates that drug trafficking by possession in Florida does not involve the intent to manufacture or distribute.

[3][4] In determining whether a particular offense is a "serious drug offense" under the ACCA, sentencing courts adopt a categorical approach, looking only to

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the statutory definition of the crime charged, rather than the actual facts of the individual's prior conviction. *See Taylor v. United States*, 495 U.S. 575, 600-02, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) ; *see also, Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 1257, 161 L.Ed.2d 205 (2005). The definition of a qualifying state offense under the ACCA is a matter of federal law. *Taylor*, 495 U.S. at 590-91, 110 S.Ct. 2143.

Florida, like Georgia, has a three-tiered scheme for punishing drug-related offenses. Under Florida law, those three tiers are the following: (1) possession of any amount of a controlled substance, Fla. Stat. § 893.13(6)(a); (2) possession with intent to distribute a controlled substance, § 893.13(1)(a); and (3) trafficking in cocaine by possession of 28 grams or more of the drug, § 893.135(1)(b). Under this third tier, trafficking in cocaine is further delineated according to the amount of drugs that the defendant possessed, and the sentence imposed increases accordingly. *See id.* James was convicted under this third tier for possession of between 200 and 400 grams of cocaine. Fla. Stat. § 893.135(1)(b)(1)(b).

Florida's three-tiered system for punishing drug crimes is nearly identical to Georgia's three-tiered scheme. Although *Madera-Madera* involved Georgia law, we see no reason to distinguish *Madera-Madera* from this appeal. We hold that Florida's drug trafficking statute also "infers an intent to distribute once a defendant possesses a certain amount of drugs." *Madera-Madera*, 333 F.3d at 1232. In both *1155 Florida and Georgia, the defendant must be in possession of a significant quantity of drugs, namely 28 grams, before the state deems the offense to be "trafficking." Moreover, under both the Georgia and Florida schemes, drug trafficking is a more serious offense, and is punished more harshly, than either simple possession or possession with intent to distribute. *See Gibbs*, 698 So.2d at 1209 ("[T]he legislature intended that trafficking possession, which requires the possession of more than twenty-eight grams of cocaine, be punished more harshly than simple possession, which merely requires the possession of less than twenty-eight grams of any illegal drug."). Florida's three-tiered scheme for punishing drug crimes is not materially distinguishable from Georgia's, and therefore, our reasoning in *Madera-Madera* controls this case. Accordingly, Florida's drug trafficking statute necessarily infers an intent to distribute once a defendant possesses 28 grams or more.

[5] Furthermore, it is not necessary that the Florida statute under which James was convicted include as an element of the offense an intent to manufacture or distribute cocaine in order for James to be sentenced under the ACCA, as the district court ruled. The language of the Florida statute need not exactly match the ACCA's definition of a "serious drug offense." *See Madera-Madera*, 333 F.3d at 1233 (explaining that the wording of the Georgia statute need not exactly match the wording of the Sentencing Guidelines because the Sentencing Commission did not define drug trafficking by its elements, but rather by the type of conduct prohibited). Rather, the question is whether the Florida statute falls within the ACCA's definition of a "serious drug offense." The definition broadly includes any offense "involving" the manufacture, distribution, or possession with intent to manufacture or distribute. 18 U.S.C. § 924(e)(2)(A)(ii). This "involving" language makes clear that the term "serious drug offense" may include even those state offenses that do not have as an element the manufacture, distribution, or possession of drugs with intent to manufacture or distribute. Therefore, the Florida statute falls within the broad definition of a "serious drug offense."

Finally, James was convicted of trafficking, the most serious drug offense in Florida. To hold that this conviction does not qualify as a "serious drug offense" for purposes of the ACCA enhancement would create an anomaly. *See Madera-Madera*, 333 F.3d at 1233-34 (discussing the potential anomalous result if the defendant's trafficking offense did not qualify for enhancement under the Sentencing Guidelines). If James had been convicted in Florida of a lesser offense, such as possession with intent to distribute, he would qualify for enhanced sentencing under the ACCA. However, as the case stands now, James would not qualify for such enhanced sentencing because the Government charged James with--and James pled guilty to--a more serious trafficking offense. The district court recognized this anomaly at sentencing noting that, under its ruling, James's plea to a greater offense had ensured that he would be treated more--not less--leniently under the ACCA. Such an anomalous result would thwart the ACCA's purpose. *See United States v. Pope*, 132 F.3d 684, 691 (11th Cir.1998) (noting that the ACCA was intended to provide additional punishment for habitual offenders who Congress found to be responsible for the disproportionate number of violent crimes).

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Here, James pled guilty to trafficking in cocaine by possession of between 200 and 400 grams of the drug. Florida's three-tiered scheme recognizes that someone who is in possession of between 200 and *1156 400 grams of cocaine intends to manufacture and distribute, and thereby, "traffic" those drugs. Moreover, federal law permits an inference of intent to distribute from a defendant's possession of a significantly large quantity of drugs. *See United States v. Bain*, 736 F.2d 1480, 1486 (11th Cir.1984). *Gibbs v. State*, 698 So.2d 1206, does not require a contrary result because interpretation of the term "serious drug offense" is a matter of federal law as determined by the federal courts. *See Taylor*, 495 U.S. at 590-91. Accordingly, James's conviction for trafficking in cocaine by possession of between 200 and 400 grams of cocaine falls within the ACCA's definition of a "serious drug offense."

We hold that the district court erred when it found that James's conviction for trafficking in cocaine by possession was not a qualifying conviction under the ACCA. We further find below that the district court did not err when it held that James's conviction for attempted burglary is a qualifying conviction. Therefore, because James has three qualifying felony convictions, we vacate and remand, directing the district court to sentence James in accordance with the ACCA.

B. Whether Attempted Burglary of a Dwelling is a "Violent Felony"

[6] James argues on cross-appeal that his Florida state conviction for attempted burglary is not a "violent felony" under § 924(e), and therefore, that the district court erred in counting that conviction as a qualifying conviction under the ACCA. The ACCA defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year ... that--(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)

On appeal, James asserts that, under Florida law, attempted burglary does not fall within the definition of a "violent felony" because it does not pose a serious potential risk of physical injury to another. Instead, he argues, attempted burglary poses merely "a risk of a risk." *United States v. Weekley*, 24 F.3d 1125, 1125 (9th Cir.1994).

In response, the Government relies on our precedent in *United States v. Wilkerson*, 286 F.3d at 1326 (quoting § 924(e)(2)(B)(ii), in which we established that an incohate crime qualified as a violent felony when its object involved conduct that "present[ed] a serious potential risk of physical injury to another.") In *Wilkerson*, we held that a conviction for conspiracy to commit robbery in violation of Florida law qualified as a "violent felony." *Id.* First, we reasoned that robbery itself was a "violent felony" under § 924(e)(2)(B) because it presented a serious risk of physical injury to another. *Id.* at 1325. We further reasoned that "a conspiracy that has as its object the offense of robbery likewise presents such a risk." *Id.* We noted that "[w]hen one reaches an agreement with a co-conspirator to commit a robbery, and formulates the intent to commit the robbery, his conduct presents at least a potential risk of physical injury within the meaning of § 924(e)(2)(B)(ii)." *Id.* at 1325-26.

Likewise, the Government cites *United States v. Rainey*, 362 F.3d 733 (11th Cir.2004) (per curiam), *cert. denied*, 541 U.S. 1081, 124 S.Ct. 2433, 158 L.Ed.2d 996 (2004), the case upon which the district court based its decision. In *Rainey*, we relied on *Wilkerson* to hold that a conviction for attempted arson under Florida law *1157 qualified as a "violent felony" under § 924(e)(2)(B)(ii). *Rainey*, 362 F.3d at 736. In *Rainey*, we noted that we had not previously decided whether an attempt to commit an enumerated felony under § 924(e) constituted a "violent felony." *Id.* at 735. However, following our reasoning in *Wilkerson*, we held that "[a]ttempt, like conspiracy, presents the potential risk of physical injury to another. Because attempted arson presents a serious potential risk of injury to another, we [held] that the district court correctly concluded that it [was] a violent felony under § 924(e)." *Id.* at 736. Moreover, in *United States v. Gunn*, 369 F.3d 1229, 1238 (11th Cir.2004) (per curiam), *cert. denied*, *Cantillo v. United States*, 543 U.S. 937, 125 S.Ct. 324, 160 L.Ed.2d 244 (2004), we held that attempted burglary is a "crime of violence" for purposes of United States Sentencing Guidelines Manual § 4B1.1(a)(2), reasoning that "[a]ttempted burglary presents a serious potential risk of physical injury to another. An uncompleted burglary does not diminish the potential risk of physical injury."

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Relying on our precedent in *Wilkerson* and *Rainey*, we affirm the district court's ruling and hold that attempted burglary under Florida law is a "violent felony" under § 924(e)(2)(B). The district court ruled that, because burglary is an enumerated felony under § 924(e)(2)(B)(ii), and because under *Rainey* an attempt to commit an enumerated felony under § 924(e)(2)(B)(ii) constitutes a "violent felony," attempted burglary is also a "violent felony." We agree. We reject James's argument that attempted burglary merely poses "a risk of a risk" and instead hold that an attempt to commit burglary, like an attempt to commit arson, presents the potential risk of physical injury to another sufficient to satisfy the ACCA's definition of a "violent felony."

III. CONCLUSION

For the above reasons, we vacate James's sentence and remand, directing the district court to sentence James in accordance with the ACCA.

VACATED AND REMANDED.

430 F.3d 1150

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APPENDIX B

U.S. CONST., ART. I, § 8

Section 8. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post offices and post roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;--And

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

APPENDIX C

18 U.S.C. § 922

Title 18, U.S.C. § 922. Unlawful acts

(a) It shall be unlawful--

(1) for any person--

(A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce; or

(B) except a licensed importer or licensed manufacturer, to engage in the business of importing or manufacturing ammunition, or in the course of such business, to ship, transport, or receive any ammunition in interstate or foreign commerce;

(2) for any importer, manufacturer, dealer, or collector licensed under the provisions of this chapter to ship or transport in interstate or foreign commerce any firearm to any person other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, except that--

(A) this paragraph and subsection (b)(3) shall not be held to preclude a licensed importer, licensed manufacturer, licensed dealer, or licensed collector from returning a firearm or replacement firearm of the same kind and type to a person from whom it was received; and this paragraph shall not be held to preclude an individual from mailing a firearm owned in compliance with Federal, State, and local law to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector;

(B) this paragraph shall not be held to preclude a licensed importer, licensed manufacturer, or licensed dealer from depositing a firearm for conveyance in the mails to any officer, employee, agent, or watchman who, pursuant to the provisions of section 1715 of this title, is eligible to receive through the mails pistols, revolvers, and other firearms capable of being concealed on the person, for use in connection with his official duty; and

(C) nothing in this paragraph shall be construed as applying in any manner in the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States differently than it would apply if the District of Columbia, the Commonwealth of Puerto Rico, or the possession were in fact a State of the United States;

(3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his State of residence from transporting the firearm into or receiving it in that State, if it is lawful for such person to purchase or possess such firearm in that State, (B) shall not apply to the transportation or receipt of a firearm obtained in conformity with subsection (b)(3) of this section, and (C) shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter;

(4) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, to transport in interstate or foreign commerce any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1986), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Secretary consistent with public safety and necessity;

(5) for any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) to transfer, sell, trade, give, transport, or deliver any firearm to any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) who the transferor knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the transferor resides; except that this paragraph shall not apply to (A) the transfer, transportation, or delivery of a firearm made to carry out a bequest of a firearm to, or an acquisition by intestate succession of a firearm by, a person who is permitted to acquire or possess a firearm under the laws of the State of his residence, and (B) the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter;

(7) for any person to manufacture or import armor piercing ammunition, except that this paragraph shall not apply to--

(A) the manufacture or importation of such ammunition for the use of the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof;

(B) the manufacture of such ammunition for the purpose of exportation; and

(C) any manufacture or importation for the purposes of testing or experimentation authorized by the Secretary;

(8) for any manufacturer or importer to sell or deliver armor piercing ammunition, except that this paragraph shall not apply to--

(A) the sale or delivery by a manufacturer or importer of such ammunition for use of the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof;

(B) the sale or delivery by a manufacturer or importer of such ammunition for the purpose of exportation;

(C) the sale or delivery by a manufacturer or importer of such ammunition for the purposes of testing or experimenting authorized by the Secretary; and

(9) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, who does not reside in any State to receive any firearms unless such receipt is for lawful sporting purposes.

(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver--

(1) any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age;

(2) any firearm to any person in any State where the purchase or possession by such person of such firearm would be in violation of any State law or any published ordinance applicable at the place of sale, delivery or other disposition, unless the licensee knows or has reasonable cause to believe that the purchase or possession would not be in violation of such State law or such published ordinance;

(3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to the sale or delivery of any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States (and any licensed manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States), and (B) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

(4) to any person any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1986), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Secretary consistent with public safety and necessity; and

(5) any firearm or armor-piercing ammunition to any person unless the licensee notes in his records, required to be kept pursuant to section 923 of this chapter, the name, age, and place of residence of such person if the person is an individual, or the identity and principal and local places of business of such person if the person is a corporation or other business entity.

Paragraphs (1), (2), (3), and (4) of this subsection shall not apply to transactions between licensed importers, licensed manufacturers, licensed dealers, and licensed collectors. Paragraph (4) of this subsection shall not apply to a sale or delivery to any research organization designated by the Secretary.

(c) In any case not otherwise prohibited by this chapter, a licensed importer, licensed manufacturer, or licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer, or dealer) only if--

(1) the transferee submits to the transferor a sworn statement in the following form:

"Subject to penalties provided by law, I swear that, in the case of any firearm other than a shotgun or a rifle, I am twenty-one years or more of age, or that, in the case of a shotgun or a rifle, I am eighteen years or more of age; that I am not prohibited by the provisions of chapter 44 of title 18, United States Code, from receiving a firearm in interstate or foreign commerce; and that my receipt of this firearm will not be in violation of any statute of the State and published ordinance applicable to the locality in which I reside. Further, the true title, name, and address of the principal law enforcement officer of the locality to which the firearm will be delivered are .....

Signature ..... Date ....."

and containing blank spaces for the attachment of a true copy of any permit or other information required pursuant to such statute or published ordinance;

(2) the transferor has, prior to the shipment or delivery of the firearm, forwarded by registered or certified mail (return receipt requested) a copy of the sworn statement, together with a description of the firearm, in a form prescribed by the Secretary, to the chief law enforcement officer of the transferee's place of residence, and has received a return receipt evidencing delivery of the statement or has had the statement returned due to the refusal of the named addressee to accept such letter in accordance with United States Post Office Department regulations; and

(3) the transferor has delayed shipment or delivery for a period of at least seven days following receipt of the notification of the acceptance or refusal of delivery of the statement.

A copy of the sworn statement and a copy of the notification to the local law enforcement officer, together with evidence of receipt or rejection of that notification shall be retained by the licensee as a part of the records required to be kept under section 923(g).

(d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person--

(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) is a fugitive from justice;

(3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) has been adjudicated as a mental defective or has been committed to any mental institution;

(5) who, being an alien--

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, except that this paragraph shall only apply to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and

(B)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) has been convicted in any court of a misdemeanor crime of domestic violence.

This subsection shall not apply with respect to the sale or disposition of a firearm or ammunition to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector who pursuant to subsection (b) of section 925 of this chapter is not precluded from dealing in firearms or ammunition, or to a person who has been granted relief from disabilities pursuant to subsection (c) of section 925 of this chapter.

(e) It shall be unlawful for any person knowingly to deliver or cause to be delivered to any common or contract carrier for transportation or shipment in interstate or foreign commerce, to persons other than licensed importers, licensed manufacturers, licensed dealers, or licensed collectors, any package or other container in which there is any firearm or ammunition without written notice to the carrier that such firearm or ammunition is being transported or shipped; except that any passenger who owns or legally possesses a firearm or ammunition being transported aboard any common or contract carrier for movement with the passenger in interstate or foreign commerce may deliver said firearm or ammunition into the custody of the pilot, captain, conductor or operator of such common or contract carrier for the duration of the trip without violating any of the provisions of this chapter.

No common or contract carrier shall require or cause any label, tag, or other written notice to be placed on the outside of any package, luggage, or other container that such package, luggage, or other container contains a firearm.

(f)(1) It shall be unlawful for any common or contract carrier to transport or deliver in interstate or foreign commerce any firearm or ammunition with knowledge or reasonable cause to believe that the shipment, transportation, or receipt thereof would be in violation of the provisions of this chapter.

(2) It shall be unlawful for any common or contract carrier to deliver in interstate or foreign commerce any firearm without obtaining written acknowledgement of receipt from the recipient of the package or other container in which there is a firearm.

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien--

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(h) It shall be unlawful for any individual, who to that individual's knowledge and while being employed for any person described in any paragraph of subsection (g) of this section, in the course of such employment--

(1) to receive, possess, or transport any firearm or ammunition in or affecting interstate or foreign commerce; or

(2) to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(i) It shall be unlawful for any person to transport or ship in interstate or foreign commerce, any stolen firearm or stolen ammunition, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(j) It shall be unlawful for any person to receive, possess, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition, which is moving as, which is a part of, which constitutes, or which has been shipped or transported in, interstate or foreign commerce, either before or after it was stolen, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(k) It shall be unlawful for any person knowingly to transport, ship, or receive, in interstate or foreign commerce, any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered or to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.

(l) Except as provided in section 925(d) of this chapter, it shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof any firearm or ammunition; and it shall be unlawful for any person knowingly to receive any firearm or ammunition which has been imported or brought into the United States or any possession thereof in violation of the provisions of this chapter.

(m) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or

licensed collector knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder.

(n) It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(o)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to--

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

(p)(1) It shall be unlawful for any person to manufacture, import, sell, ship, deliver, possess, transfer, or receive any firearm--

(A) that, after removal of grips, stocks, and magazines, is not as detectable as the Security Exemplar, by walk-through metal detectors calibrated and operated to detect the Security Exemplar; or

(B) any major component of which, when subjected to inspection by the types of x-ray machines commonly used at airports, does not generate an image that accurately depicts the shape of the component. Barium sulfate or other compounds may be used in the fabrication of the component.

(2) For purposes of this subsection--

(A) the term "firearm" does not include the frame or receiver of any such weapon;

(B) the term "major component" means, with respect to a firearm, the barrel, the slide or cylinder, or the frame or receiver of the firearm; and

(C) the term "Security Exemplar" means an object, to be fabricated at the direction of the Secretary, that is--

(i) constructed of, during the 12-month period beginning on the date of the enactment of this subsection, 3.7 ounces of material type 17-4 PH stainless steel in a shape resembling a handgun; and

(ii) suitable for testing and calibrating metal detectors:

Provided, however, That at the close of such 12-month period, and at appropriate times thereafter the Secretary shall promulgate regulations to permit the manufacture, importation, sale, shipment, delivery, possession, transfer, or receipt of firearms previously prohibited under this subparagraph that are as detectable as a "Security Exemplar" which contains 3.7 ounces of material type 17-4 PH stainless steel, in a shape resembling a handgun, or such lesser amount as is detectable in view of advances in state-of-the-art developments in weapons detection technology.

(3) Under such rules and regulations as the Secretary shall prescribe, this subsection shall not apply to the manufacture, possession, transfer, receipt, shipment, or delivery of a firearm by a licensed manufacturer or any person acting pursuant to a contract with a licensed manufacturer, for the purpose of examining and testing such firearm to determine whether paragraph (1) applies to such firearm. The Secretary shall ensure that rules and regulations adopted pursuant to this paragraph do not impair the manufacture of prototype firearms or the development of new technology.

(4) The Secretary shall permit the conditional importation of a firearm by a licensed importer or licensed manufacturer, for examination and testing to determine whether or not the unconditional importation of such firearm would violate this subsection.

(5) This subsection shall not apply to any firearm which--

(A) has been certified by the Secretary of Defense or the Director of Central Intelligence, after consultation with the Secretary and the Administrator of the Federal Aviation Administration, as necessary for military or intelligence applications; and

(B) is manufactured for and sold exclusively to military or intelligence agencies of the United States.

(6) This subsection shall not apply with respect to any firearm manufactured in, imported into, or possessed in the United States before the date of the enactment of the Undetectable Firearms Act of 1988.

(q)(1) The Congress finds and declares that--

(A) crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem;

(B) crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs;

(C) firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools, as documented in numerous hearings in both the Committee on the Judiciary the [FN1] House of Representatives and the Committee on the Judiciary of the Senate;

(D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw

materials from which they are made have considerably moved in interstate commerce;

(E) while criminals freely move from State to State, ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason;

(F) the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country;

(G) this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States;

(H) States, localities, and school systems find it almost impossible to handle gun-related crime by themselves--even States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun- related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures; and

(I) the Congress has the power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection.

(2)(A) It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.

(B) Subparagraph (A) does not apply to the possession of a firearm--

(i) on private property not part of school grounds;

(ii) if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtains such a license, the law enforcement authorities of the State or political subdivision verify that the individual is qualified under law to receive the license;

(iii) that is--

(I) not loaded; and

(II) in a locked container, or a locked firearms rack that is on a motor vehicle;

(iv) by an individual for use in a program approved by a school in the school zone;

(v) by an individual in accordance with a contract entered into between a school in the school zone and the individual or an employer of the individual;

(vi) by a law enforcement officer acting in his or her official capacity; or

(vii) that is unloaded and is possessed by an individual while traversing school premises for the purpose of gaining access to public or private lands open to hunting, if the entry on school premises is authorized by school authorities.

(3)(A) Except as provided in subparagraph (B), it shall be unlawful for any person, knowingly or with reckless disregard for the safety of another, to discharge or attempt to discharge a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the person knows is a school zone.

(B) Subparagraph (A) does not apply to the discharge of a firearm--

(i) on private property not part of school grounds;

(ii) as part of a program approved by a school in the school zone, by an individual who is participating in the program;

(iii) by an individual in accordance with a contract entered into between a school in a school zone and the individual or an employer of the individual; or

(iv) by a law enforcement officer acting in his or her official capacity.

(4) Nothing in this subsection shall be construed as preempting or preventing a State or local government from enacting a statute establishing gun free school zones as provided in this subsection.

(r) It shall be unlawful for any person to assemble from imported parts any semiautomatic rifle or any shotgun which is identical to any rifle or shotgun prohibited from importation under section 925(d)(3) of this chapter as not being particularly suitable for or readily adaptable to sporting purposes except that this subsection shall not apply to--

(1) the assembly of any such rifle or shotgun for sale or distribution by a licensed manufacturer to the United States or any department or agency thereof or to any State or any department, agency, or political subdivision thereof; or

(2) the assembly of any such rifle or shotgun for the purposes of testing or experimentation authorized by the Secretary.

(s)(1) Beginning on the date that is 90 days after the date of enactment of this subsection and ending on the day before the date that is 60 months after such date of enactment, it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer a handgun (other than the return of a handgun to the person from whom it was received) to an individual who is not licensed under section 923, unless--

(A) after the most recent proposal of such transfer by the transferee--

(i) the transferor has--

(I) received from the transferee a statement of the transferee containing the information described in paragraph (3);

(II) verified the identity of the transferee by examining the identification document presented;

(III) within 1 day after the transferee furnishes the statement, provided notice of the contents of the statement to the chief law enforcement officer of the place of residence of the transferee; and

(IV) within 1 day after the transferee furnishes the statement, transmitted a copy of the statement to the chief law enforcement officer of the place of residence of the transferee; and

(ii)(I) 5 business days (meaning days on which State offices are open) have elapsed from the date the transferor furnished notice of the contents of the statement to the chief law enforcement officer, during which period the transferor has not received information from the chief law enforcement officer that receipt or possession of the handgun by the transferee would be in violation of Federal, State, or local law; or

(II) the transferor has received notice from the chief law enforcement officer that the officer has no information indicating that receipt or possession of the handgun by the transferee would violate Federal, State, or local law;

(B) the transferee has presented to the transferor a written statement, issued by the chief law enforcement officer of the place of residence of the transferee during the 10-day period ending on the date of the most recent proposal of such transfer by the transferee, stating that the transferee requires access to a handgun because of a threat to the life of the transferee or of any member of the household of the transferee;

(C)(i) the transferee has presented to the transferor a permit that--

(I) allows the transferee to possess or acquire a handgun; and

(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of the law;

(D) the law of the State requires that, before any licensed importer, licensed manufacturer, or licensed dealer completes the transfer of a handgun to an individual who is not licensed under section 923, an authorized government official verify that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of law;

(E) the Secretary has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

(F) on application of the transferor, the Secretary has certified that compliance with subparagraph (A)(i)(III) is impracticable because--

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

(ii) the business premises of the transferor at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer; and

(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

(2) A chief law enforcement officer to whom a transferor has provided notice pursuant to paragraph (1)(A)(i)(III) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

(3) The statement referred to in paragraph (1)(A)(i)(I) shall contain only--

(A) the name, address, and date of birth appearing on a valid identification document (as defined in section 1028(d)(1)) of the transferee containing a photograph of the transferee and a description of the identification used;

(B) a statement that the transferee--

(i) is not under indictment for, and has not been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year, and has not been convicted in any court of a misdemeanor crime of domestic violence;

(ii) is not a fugitive from justice;

(iii) is not an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act);

(iv) has not been adjudicated as a mental defective or been committed to a mental institution;

(v) is not an alien who--

(I) is illegally or unlawfully in the United States; or

(II) subject to subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C.

1101(a)(26)));

(vi) has not been discharged from the Armed Forces under dishonorable conditions; and

(vii) is not a person who, having been a citizen of the United States, has renounced such citizenship;

(C) the date the statement is made; and

(D) notice that the transferee intends to obtain a handgun from the transferor.

(4) Any transferor of a handgun who, after such transfer, receives a report from a chief law enforcement officer containing information that receipt or possession of the handgun by the transferee violates Federal, State, or local law shall, within 1 business day after receipt of such request, communicate any information related to the transfer that the transferor has about the transfer and the transferee to--

(A) the chief law enforcement officer of the place of business of the transferor; and

(B) the chief law enforcement officer of the place of residence of the transferee.

(5) Any transferor who receives information, not otherwise available to the public, in a report under this subsection shall not disclose such information except to the transferee, to law enforcement authorities, or pursuant to the direction of a court of law.

(6)(A) Any transferor who sells, delivers, or otherwise transfers a handgun to a transferee shall retain the copy of the statement of the transferee with respect to the handgun transaction, and shall retain evidence that the transferor has complied with subclauses (III) and (IV) of paragraph (1)(A)(i) with respect to the statement.

(B) Unless the chief law enforcement officer to whom a statement is transmitted under paragraph (1)(A)(i)(IV) determines that a transaction would violate Federal, State, or local law--

(i) the officer shall, within 20 business days after the date the transferee made the statement on the basis of which the notice was provided, destroy the statement, any record containing information derived from the statement, and any record created as a result of the notice required by paragraph (1)(A)(i)(III);

(ii) the information contained in the statement shall not be conveyed to any person except a person who has a need to know in order to carry out this subsection; and

(iii) the information contained in the statement shall not be used for any purpose other than to carry out this subsection.

(C) If a chief law enforcement officer determines that an individual is ineligible to receive a

handgun and the individual requests the officer to provide the reason for such determination, the officer shall provide such reasons to the individual in writing within 20 business days after receipt of the request.

(7) A chief law enforcement officer or other person responsible for providing criminal history background information pursuant to this subsection shall not be liable in an action at law for damages--

(A) for failure to prevent the sale or transfer of a handgun to a person whose receipt or possession of the handgun is unlawful under this section; or

(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a handgun.

(8) For purposes of this subsection, the term "chief law enforcement officer" means the chief of police, the sheriff, or an equivalent officer or the designee of any such individual.

(9) The Secretary shall take necessary actions to ensure that the provisions of this subsection are published and disseminated to licensed dealers, law enforcement officials, and the public.

(t)(1) Beginning on the date that is 30 days after the Attorney General notifies licensees under section 103(d) of the Brady Handgun Violence Prevention Act that the national instant criminal background check system is established, a licensed importer, licensed manufacturer, or licensed dealer shall not transfer a firearm to any other person who is not licensed under this chapter, unless--

(A) before the completion of the transfer, the licensee contacts the national instant criminal background check system established under section 103 of that Act;

(B)(i) the system provides the licensee with a unique identification number; or

(ii) 3 business days (meaning a day on which State offices are open) have elapsed since the licensee contacted the system, and the system has not notified the licensee that the receipt of a firearm by such other person would violate subsection (g) or (n) of this section; and

(C) the transferor has verified the identity of the transferee by examining a valid identification document (as defined in section 1028(d)(1) of this title) of the transferee containing a photograph of the transferee.

(2) If receipt of a firearm would not violate subsection (g) or (n) or State law, the system shall--

(A) assign a unique identification number to the transfer;

(B) provide the licensee with the number; and

(C) destroy all records of the system with respect to the call (other than the identifying number and

the date the number was assigned) and all records of the system relating to the person or the transfer.

(3) Paragraph (1) shall not apply to a firearm transfer between a licensee and another person if--

(A)(i) such other person has presented to the licensee a permit that--

(I) allows such other person to possess or acquire a firearm; and

(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a firearm by such other person would be in violation of law;

(B) the Secretary has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

(C) on application of the transferor, the Secretary has certified that compliance with paragraph (1)(A) is impracticable because--

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

(ii) the business premises of the licensee at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer (as defined in subsection (s)(8)); and

(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

(4) If the national instant criminal background check system notifies the licensee that the information available to the system does not demonstrate that the receipt of a firearm by such other person would violate subsection (g) or (n) or State law, and the licensee transfers a firearm to such other person, the licensee shall include in the record of the transfer the unique identification number provided by the system with respect to the transfer.

(5) If the licensee knowingly transfers a firearm to such other person and knowingly fails to comply with paragraph (1) of this subsection with respect to the transfer and, at the time such other person most recently proposed the transfer, the national instant criminal background check system was operating and information was available to the system demonstrating that receipt of a firearm by such other person would violate subsection (g) or (n) of this section or State law, the Secretary may, after notice and opportunity for a hearing, suspend for not more than 6 months or revoke any license issued to the licensee under section 923, and may impose on the licensee a civil fine of not more than $5,000.

(6) Neither a local government nor an employee of the Federal Government or of any State or local

government, responsible for providing information to the national instant criminal background check system shall be liable in an action at law for damages--

(A) for failure to prevent the sale or transfer of a firearm to a person whose receipt or possession of the firearm is unlawful under this section; or

(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a firearm.

(u) It shall be unlawful for a person to steal or unlawfully take or carry away from the person or the premises of a person who is licensed to engage in the business of importing, manufacturing, or dealing in firearms, any firearm in the licensee's business inventory that has been shipped or transported in interstate or foreign commerce.

(v)(1) It shall be unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon.

(2) Paragraph (1) shall not apply to the possession or transfer of any semiautomatic assault weapon otherwise lawfully possessed under Federal law on the date of the enactment of this subsection.

(3) Paragraph (1) shall not apply to--

(A) any of the firearms, or replicas or duplicates of the firearms, specified in Appendix A to this section, as such firearms were manufactured on October 1, 1993;

(B) any firearm that--

(i) is manually operated by bolt, pump, lever, or slide action;

(ii) has been rendered permanently inoperable; or

(iii) is an antique firearm;

(C) any semiautomatic rifle that cannot accept a detachable magazine that holds more than 5 rounds of ammunition; or

(D) any semiautomatic shotgun that cannot hold more than 5 rounds of ammunition in a fixed or detachable magazine.

The fact that a firearm is not listed in Appendix A shall not be construed to mean that paragraph (1) applies to such firearm. No firearm exempted by this subsection may be deleted from Appendix A so long as this subsection is in effect.

(4) Paragraph (1) shall not apply to--

(A) the manufacture for, transfer to, or possession by the United States or a department or agency

of the United States or a State or a department, agency, or political subdivision of a State, or a transfer to or possession by a law enforcement officer employed by such an entity for purposes of law enforcement (whether on or off duty);

(B) the transfer to a licensee under title I of the Atomic Energy Act of 1954 for purposes of establishing and maintaining an on-site physical protection system and security organization required by Federal law, or possession by an employee or contractor of such licensee on-site for such purposes or off-site for purposes of licensee-authorized training or transportation of nuclear materials;

(C) the possession, by an individual who is retired from service with a law enforcement agency and is not otherwise prohibited from receiving a firearm, of a semiautomatic assault weapon transferred to the individual by the agency upon such retirement; or

(D) the manufacture, transfer, or possession of a semiautomatic assault weapon by a licensed manufacturer or licensed importer for the purposes of testing or experimentation authorized by the Secretary.

(w)(1) Except as provided in paragraph (2), it shall be unlawful for a person to transfer or possess a large capacity ammunition feeding device.

(2) Paragraph (1) shall not apply to the possession or transfer of any large capacity ammunition feeding device otherwise lawfully possessed on or before the date of the enactment of this subsection.

(3) This subsection shall not apply to--

(A) the manufacture for, transfer to, or possession by the United States or a department or agency of the United States or a State or a department, agency, or political subdivision of a State, or a transfer to or possession by a law enforcement officer employed by such an entity for purposes of law enforcement (whether on or off duty);

(B) the transfer to a licensee under title I of the Atomic Energy Act of 1954 for purposes of establishing and maintaining an on-site physical protection system and security organization required by Federal law, or possession by an employee or contractor of such licensee on-site for such purposes or off-site for purposes of licensee-authorized training or transportation of nuclear materials;

(C) the possession, by an individual who is retired from service with a law enforcement agency and is not otherwise prohibited from receiving ammunition, of a large capacity ammunition feeding device transferred to the individual by the agency upon such retirement; or

(D) the manufacture, transfer, or possession of any large capacity ammunition feeding device by a licensed manufacturer or licensed importer for the purposes of testing or experimentation authorized by the Secretary.

(4) If a person charged with violating paragraph (1) asserts that paragraph (1) does not apply to such

person because of paragraph (2) or (3), the Government shall have the burden of proof to show that such paragraph (1) applies to such person. The lack of a serial number as described in section 923(i) of this title shall be a presumption that the large capacity ammunition feeding device is not subject to the prohibition of possession in paragraph (1).

(x)(1) It shall be unlawful for a person to sell, deliver, or otherwise transfer to a person who the transferor knows or has reasonable cause to believe is a juvenile--

(A) a handgun; or

(B) ammunition that is suitable for use only in a handgun.

(2) It shall be unlawful for any person who is a juvenile to knowingly possess--

(A) a handgun; or

(B) ammunition that is suitable for use only in a handgun.

(3) This subsection does not apply to--

(A) a temporary transfer of a handgun or ammunition to a juvenile or to the possession or use of a handgun or ammunition by a juvenile if the handgun and ammunition are possessed and used by the juvenile--

(i) in the course of employment, in the course of ranching or farming related to activities at the residence of the juvenile (or on property used for ranching or farming at which the juvenile, with the permission of the property owner or lessee, is performing activities related to the operation of the farm or ranch), target practice, hunting, or a course of instruction in the safe and lawful use of a handgun;

(ii) with the prior written consent of the juvenile's parent or guardian who is not prohibited by Federal, State, or local law from possessing a firearm, except--

(I) during transportation by the juvenile of an unloaded handgun in a locked container directly from the place of transfer to a place at which an activity described in clause (i) is to take place and transportation by the juvenile of that handgun, unloaded and in a locked container, directly from the place at which such an activity took place to the transferor; or

(II) with respect to ranching or farming activities as described in clause (i), a juvenile may possess and use a handgun or ammunition with the prior written approval of the juvenile's parent or legal guardian and at the direction of an adult who is not prohibited by Federal, State or local law from possessing a firearm;

(iii) the juvenile has the prior written consent in the juvenile's possession at all times when a handgun is in the possession of the juvenile; and

(iv) in accordance with State and local law;

(B) a juvenile who is a member of the Armed Forces of the United States or the National Guard who possesses or is armed with a handgun in the line of duty;

(C) a transfer by inheritance of title (but not possession) of a handgun or ammunition to a juvenile; or

(D) the possession of a handgun or ammunition by a juvenile taken in defense of the juvenile or other persons against an intruder into the residence of the juvenile or a residence in which the juvenile is an invited guest.

(4) A handgun or ammunition, the possession of which is transferred to a juvenile in circumstances in which the transferor is not in violation of this subsection shall not be subject to permanent confiscation by the Government if its possession by the juvenile subsequently becomes unlawful because of the conduct of the juvenile, but shall be returned to the lawful owner when such handgun or ammunition is no longer required by the Government for the purposes of investigation or prosecution.

(5) For purposes of this subsection, the term "juvenile" means a person who is less than 18 years of age.

(6)(A) In a prosecution of a violation of this subsection, the court shall require the presence of a juvenile defendant's parent or legal guardian at all proceedings.

(B) The court may use the contempt power to enforce subparagraph (A).

(C) The court may excuse attendance of a parent or legal guardian of a juvenile defendant at a proceeding in a prosecution of a violation of this subsection for good cause shown.

(y) Provisions relating to aliens admitted under nonimmigrant visas--

(1) Definitions.--In this subsection--

(A) the term "alien" has the same meaning as in section 101(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(3)); and

(B) the term "nonimmigrant visa" has the same meaning as in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)).

(2) Exceptions.--Subsections (d)(5)(B), (g)(5)(B), and (s)(3)(B)(v)(II) do not apply to any alien who has been lawfully admitted to the United States under a nonimmigrant visa, if that alien is--

(A) admitted to the United States for lawful hunting or sporting purposes or is in possession of a hunting license or permit lawfully issued in the United States;

(B) an official representative of a foreign government who is--

(i) accredited to the United States Government or the Government's mission to an international organization having its headquarters in the United States; or

(ii) en route to or from another country to which that alien is accredited;

(C) an official of a foreign government or a distinguished foreign visitor who has been so designated by the Department of State; or

(D) a foreign law enforcement officer of a friendly foreign government entering the United States on official law enforcement business.

(3) Waiver--

(A) Conditions for waiver.--Any individual who has been admitted to the United States under a nonimmigrant visa may receive a waiver from the requirements of subsection (g)(5), if--

(i) the individual submits to the Attorney General a petition that meets the requirements of subparagraph (C); and

(ii) the Attorney General approves the petition.

(B) Petition.--Each petition under subparagraph (B) shall--

(i) demonstrate that the petitioner has resided in the United States for a continuous period of not less than 180 days before the date on which the petition is submitted under this paragraph; and

(ii) include a written statement from the embassy or consulate of the petitioner, authorizing the petitioner to acquire a firearm or ammunition and certifying that the alien would not, absent the application of subsection (g)(5)(B), otherwise be prohibited from such acquisition under subsection (g).

(C) Approval of petition.--The Attorney General shall approve a petition submitted in accordance with this paragraph, if the Attorney General determines that waiving the requirements of subsection (g)(5)(B) with respect to the petitioner--

(i) would be in the interests of justice; and

(ii) would not jeopardize the public safety.

APPENDIX A

Centerfire Rifles--Autoloaders

Browning BAR Mark II Safari Semi-Auto Rifle

Browning BAR Mark II Safari Magnum Rifle

Browning High-Power Rifle

Heckler & Koch Model 300 Rifle

Iver Johnson M-1 Carbine

Iver Johnson 50th Anniversary M-1 Carbine

Marlin Model 9 Camp Carbine

Marlin Model 45 Carbine

Remington Nylon 66 Auto-Loading Rifle

APPENDIX D

18 U.S.C. § 924

Title 18, U.S.C. § 924. **Penalties**

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), or (f) of this section, or in section 929, whoever--

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly--

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imp isoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to

comply with a condition of probation.

(ii) A juvenile is described in this clause if--

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)--

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection--

(i) is a short-barreled rifle, short-barreled shotgun, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall--

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law--

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries

armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section--

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition--

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(l), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided,* That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is

demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are--

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(l), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which--

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 802 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.),

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the

purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall--

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(k) A person who, with intent to engage in or to promote conduct that--

(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.);

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(l) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

FEDERAL PUBLIC DEFENDER
Middle District of Florida

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Federal Public Defender

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Chief Assistant Federal Public Defender

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February 14, 2006

William K. Suter
Office of the Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: Alphonso James, Jr. v. United States of America

Dear Mr. Suter:

Enclosed is the *Petition for Writ of Certiorari*, the *Motion for Leave to Proceed in Forma Pauperis*, and the *Certificate of Service*, for filing on behalf of the petitioner.

Sincerely,

Craig L. Crawford
Assistant Federal Public Defender

CLC/cim

Enclosures

cc: *Office of the Solicitor General*
Karin B. Hoppmann, Assistant United States Attorney, Tampa Division
Alphonso James, Jr.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2005

ALPHONSO JAMES, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, pursuant to Supreme Court Rule 29.5(b), that on this 14day of February 2006, true copies of the *Petition for Writ of Certiorari* and the Mon for Leave to Proceed *In Forma Pauperis* were sent by Federal Express stand overnight to the Office of the Solicitor General of the United States, Room 5712epartment of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530001 (Respondent); Karin B. Hoppmann, Assistant United States Attorney, Unitdates Attorney's Office, 400 N. Tampa Street, Suite 3200, Orlando, FL